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No. 82-550

In the Supreme Court of the United States

October Term, 1982

SHOP & SAVE FOOD MARKETS, INC.,
Petitioner,

vs.

PNEUMO CORPORATION, ABBOTT REALTY COMPANY AND P & C FOOD MARKETS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(DOCKET NO. 80-9053)

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the lease of a single property at market rent constitutes an unlawful restraint of trade under Section 1 of the Sherman Act merely because the lessor previously had offered to lease the same property at a lower rate in connection with the purchase of a second item.

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STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

Petitioner, Shop & Save Food Markets, Inc., initiated this action against Respondents, Pneumo Corporation ("Pneumo"), Abbott Realty Corporation ("Abbott") and P & C Food Markets, Inc. ("P & C"), by filing a complaint on February 22, 1978.

Petitioner is a Vermont corporation that operates retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. P & C is a New York corporation that

operates a chain of retail grocery stores in Vermont and four other states; P & C is a subsidiary of Pneumo. Abbott, which was acquired by Pneumo in 1972, manages certain real property on behalf of Pneumo. Cross Company ("Cross"), which was identified in the Complaint but not named as a separate defendant, was also acquired by Pneumo in 1972 and distributes grocery products at wholesale.

Petitioner's complaint asserted claims under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), Section 3 of the Clayton Act (15 U.S.C. §14) and the Vermont Consumer Fraud Act (9 Vermont Statutes Annotated §§2451 *et seq.*). The claims arose out of a lease entered into between Petitioner and Abbott on October 13, 1977 for a supermarket facility located in Lyndonville, Vermont (the "Lyndonville store") and the negotiations leading to the execution of that lease. Specifically, Petitioner averred that the Respondents, all of whom are related through Pneumo's common ownership, combined and conspired to restrain trade by: (1) engaging in a tying agreement and/or attempting to impose a tying agreement on Petitioner and (2) engaging in a concerted refusal to deal and/or attempting to coerce Petitioner into a concerted refusal to deal. Those claims were predicated on Petitioner's allegation that Respondents had intended to condition the grant of a lease for the Lyndonville store on the requirement that Petitioner purchase its grocery inventory at wholesale from Cross.

On September 19, 1978, after the completion of initial discovery, Respondents moved for judgment on the pleadings or for summary judgment on Petitioner's federal antitrust claims. In response to this motion Petitioner voluntarily abandoned its claim under Section 3 of the Clayton Act.

On July 22, 1980 the district court granted summary judgment to Respondents on Petitioner's Section 1 Sherman Act claims (*see* Item 1 in the Appendix to the Petition). In addition, the district court granted summary judgment to Respondents on Petitioner's Section 2 Sherman Act claims insofar as they related to the wholesale grocery business. The court, however, reserved judgment for 90 days on Petitioner's Section 2 Sherman Act claims relating to the retail grocery business in order to permit Petitioner to conduct additional discovery. The court similarly reserved judgment on Respondents' separate motion to dismiss the Vermont Consumer Fraud Act claim.

Petitioner informed the district court on October 2, 1980 that it did not intend to conduct any additional discovery on the surviving Section 2 Sherman Act claim, and that claim was then dismissed by the district court. The Vermont Consumer Fraud Act claim was also dismissed for lack of continuing pendent jurisdiction.

Petitioner then appealed to the United States Court of Appeals for the Second Circuit *only* on the issue of whether the district court properly granted summary judgment to Respondents on the Section 1 Sherman Act claim. On January 20, 1982 the court of appeals (Judge Meskill dissenting) reversed the district court with respect to Petitioner's "tying" claim. In so holding, the court (Palmieri, J.), acknowledging its novel approach to be unprecedented, concluded that the facts alleged by Petitioner stated a cause of action for an unsuccessful tying agreement and remanded the case to the district court.

On July 2, 1982, after granting Respondents' Petition for Rehearing, the court of appeals withdrew its original opinion and affirmed Judge Coffrin's decision, holding that "an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation" or an unlawful boycott. *See* Item 4 in the Appendix to the Petition at A43.

B. Statement of Facts

The facts were succinctly set forth in the district court's Opinion and Order (Appendix to the Petition at A3-4) and the opinion of the court of appeals (Appendix to the Petition at A38-40). Although Petitioner seeks review of an opinion affirming summary judgment for Respondents, the relevant and undisputed facts are few and dispositive of Petitioner's claim:

1. Respondents offered Petitioner a 12-year sublease of the Lyndonville store with no provision that Petitioner must purchase its groceries at wholesale from Cross, or must refrain from purchasing groceries at wholesale from any other supplier.

2. This offer was accepted "unconditionally" by Petitioner on May 5, 1977.

3. Since May 5, 1977 Petitioner has continued to occupy the Lyndonville store pursuant to a new 12-year sublease and has purchased virtually all of its grocery inventory from sources other than Cross.

SUMMARY OF ARGUMENT

Respondents oppose the Petition for Certiorari because the decision by the United States Court of Appeals for the Second Circuit affirming summary judgment for Respondents is totally consistent with well-recognized principles of federal antitrust law announced by this Court and by the lower courts. The Petition is predicated on a fanciful view of economic injury and a fundamental misunderstanding of both the purpose and operation of the antitrust laws. Petitioner has attempted to force an ordinary commercial dispute into the framework of a claim under Section 1 of the Sherman Act.

Both the court of appeals and the district court recognized that the facts alleged by Petitioner fail to state a cognizable tie-in or boycott claim. Further, both courts recognized that the facts alleged by Petitioner, when viewed in the light most favorable to it, fail to present any plausible possibility of a restraint of trade, the gravamen of any claim under Section 1 of the Sherman Act.

ARGUMENT

The Petition Should Be Denied Since the Opinions Below Correctly Recognized That Petitioner Has Failed to Allege Any Facts That Could Give Rise to Injury or a Restraint of Trade.

Throughout the course of this litigation, Petitioner has sought in vain for an antitrust theory that can support a claim for damages arising out of an ordinary commercial transaction. For purposes of its Petition for Certiorari, it appears that Petitioner has settled on the following theory:

> Since it would be illegal under Section 1 of the Sherman Act to engage in a tying agreement or boycott, surely it is illegal under Section 1 of the Sherman Act to penalize a person for failing to submit to a tying agreement or boycott.

In other words, Petitioner is asking this Court to give recognition to a completely new cause of action under Section 1, *viz.*, an unsuccessful attempted tie-in or boycott. There is no economic or legal basis for this position. And even should such a theory be viable in the abstract, the "penalty" identified by the Petitioner in its allegations, namely a price differential for a tying item offered alone in excess of its stated cost as part of a tied package, cannot constitute economic injury.

A. Petitioner's claim of a penalty rent states an economic impossibility.

Petitioner's entire antitrust theory is predicated upon the notion that it was required to pay a "penalty rent" because of its refusal to accede to a tying agreement or group boycott. Petitioner's antitrust claim must fail because the notion that a penalty was extracted is wrong as a matter of simple, but incontrovertible, economics.

This case arises from Petitioner's apparent dissatisfaction with the rental terms of its sublease. It found itself in the common situation of many lessees who, upon expiration of their leases, are faced with the unpleasant reality that continued occupancy will cost more than they had previously paid. But in these circumstances neither Petitioner nor any other tenant would agree to pay rent in excess of the market value.[1] Thus, Petitioner could suffer no injury.

Petitioner contends that it was offered a more favorable rental if it would agree to purchase wholesale groceries from an affiliate of the Respondents; because it refused this arrangement, it was then offered the store location only at a higher rent. That rental differential is alleged to be the injury it incurred. Petitioner would measure market value not from the price that an item can command standing alone but, rather, from its lower price as part of a package transaction. This ironic proposition would stand tying law on its head.

The very factor that makes coerced tying unlawful is the inevitable transfer by a seller of part of the value of

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1. Petitioner voluntarily abandoned its claim under Section 2 of the Sherman Act. Thus, issues relating to abuse of monopoly power were not before the court of appeals and are not before this Court.

the tying item, in which the seller has market power, to the tied item. As a result, in a tying agreement the price attributed to the tying item, when sold as part of a package, cannot be the full market price that the tying item would ordinarily command if sold alone, because some of its value is reflected in the price of the tied item. Thus, a buyer will agree to pay more than he otherwise would for the tied item because that purchase carries with it the opportunity to acquire the tying item for less that it would otherwise cost. The evil of this transfer of value is that competition is restrained in the market for the tied item because of market power, or a monopoly position, that a seller has in another market.[2]

Therefore, in the *absence* of a two-product tie, as in *any* ordinary single product commercial transaction, the price or rental amount of an item standing alone necessarily represents its arm's-length value, or a buyer would not agree to pay it. There is *no* transfer of value from a "tying" to a "tied" product. The price for the item standing alone automatically constitutes the full market price of the item.

Contrary to Petitioner's assertion that a price differential for an item itself constitutes an illegal tie-in, there has been unanimous agreement among the courts that an unlawful tie-in cannot arise if the tying item is offered sep-

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2. This Court condemned tying in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958), precisely because it reflected the seller's use "of his power or leverage in another market". At the same time the Court noted (*id.* at 6 n.4) the economic truism that Petitioner has chosen to ignore:

> Of course, where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

The absence of any use of leverage between markets is all the more obvious when the seller offers no package at all, as ultimately was the case here.

arately—even though it is offered at a higher price than the same product is offered as a part of a package.[3] These decisions presaged the specific economic analysis applied by the court of appeals in *Kypta v. McDonald's Corp.*, 1982-1 Trade Cas. ¶64,637 (11th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3225 (U.S. Oct. 4, 1982).

As stated in Judge Feinberg's concurring opinion on the rehearing of this case (Appendix to the Petition at A44-45):

> Penalties exacted for the privilege of buying one product rather than two have been mentioned tangentially at least twice before, and on neither occasion was the practice condemned under the antitrust laws, see International Business Machines Corp. v. United States, 298 U.S. 131, 134 & 139 (1936) (15% increase in rental for release from condition that lessee buy tabulating cards only from lessor); SmithKline Corp. v. Eli Lilly & Co. 427 F.Supp. 1089, 1110-14 (E.D. Pa. 1976), aff'd on other grounds, 575 F.2d 1056, 1061 & n.3 (3d Cir.), cert. denied, 439 U.S. 838 (1978) (loss of 3% bonus rebate for failure to buy minimum amounts of three products). But cf. United States v. Loew's, Inc., 371 U.S. 38 (1961) (remedial decree forbade non-cost-justified differential between cost of single film and package. But this relief cannot, under our decision in American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1136-37 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972), be relied on to determine the elements necessary to prove an illegal tie).

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3. *See, e.g., SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd on other grounds*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); *United States v. Westinghouse Electric Corp.*, 471 F. Supp. 532 (N.D. Cal. 1978).

In the present case, Petitioner was offered a sublease of the supermarket premises alone. The Petitioner accepted the sublease offer at the rent demanded by the Respondents. If Petitioner now thinks that the rent is excessive, it simply made a bad economic choice in accepting the offer, but obviously it has not been injured by any restraint of trade. Having been charged an arm's-length rent in a single, non-tying transaction, Petitioner wants this Court now to require the lesser rental charge that allegedly could have been obtained had the sublease been part of a package transaction. A more misguided view of the antitrust laws would be difficult to imagine.

B. The lower courts' rejection of Petitioner's theory that Respondents' conduct is a per se violation of Section 1 of the Sherman Act was correct and consistent with all precedents.

Not only is Petitioner's entire case based on an economic impossibility—the so-called "penalty rent"—but Petitioner then attempts to utilize its flawed notion of a penalty as the basis for extending the scope of Section 1 of the Sherman Act beyond all established case law.

Both the district court and the court of appeals recognized that an attempted tie-in or boycott does not have the anticompetitive effects associated with a completed tie-in or boycott. Indeed, Petitioner implicitly acknowledges that its alleged injury does not arise out of a restraint of trade (Petition at 37):

> The test, from the Petitioner's standpoint, was whether it was injured as a result of conduct recognized as per se illegal, and not whether the Petitioner might fall within an improbable statistical minority whose injury comes about in a manner that arguably does not restrain trade.

It should be obvious that an antitrust claim cannot succeed in the absence of an unreasonable restraint of trade, *i.e.*, an anticompetitive effect. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *see also, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Under the most generous interpretation, the facts alleged by Petitioner fail to disclose any conduct by Respondents that unreasonably restrained trade.

Petitioner argues that since tying agreements and boycotts are evaluated under a *per se* standard, conduct which penalizes Petitioner for refusing to agree to a tying agreement or boycott must also be evaluated under the *per se* rule (Petition at 30-37). In so arguing, Petitioner is attempting to exploit the application of the *per se* rule in such a way so as to eliminate the need for this Court to consider whether the conduct alleged could have any possible anticompetitive effect. The technique, which was at first adopted and then rejected by the court of appeals, is to recast Respondents' conduct as the functional "equivalent" of a tying agreement or boycott, both of which are traditionally subject to *per se* treatment under the Sherman Act. This will not do. Judicially-created *per se* rules have been established for certain conduct because experience has shown that such conduct is virtually certain to have anticompetitive effects. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). The conduct under scrutiny here does not fall within these stringent, narrow requirements.

This Court, in *Broadcast Music, Inc. v. CBS*, *supra*, counseled caution in choosing whether to designate conduct as *per se* illegal (*id.* at 18-19, emphasis added):

> Our inquiry must focus on . . . whether the practice *facially appears* to be one that *would always or almost always* tend to restrict competition or decrease output . . . .

Upon rehearing of this case in the Second Circuit, the court unequivocally rejected the notion that a so-called "penalty rent" constitutes the type of inevitable restraint of trade which invites application of a *per se* rule. It stated (Appendix to the Petition at A43, emphasis added):

> . . . [I]n the present case, even if Shop & Save has to pay a "penalty" for the tying product, Shop & Save is free to purchase and in fact admits that it does purchase its wholesale groceries from competitors of Cross. Accordingly, because the seller is unable to use his power or leverage in the tying market to deny his competitors free access to the tied market, see Northern Pacific Railway Co. v. United States, 356 U.S. at 6, *an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation.*[5]
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> • • • • •
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> [5]As stated by this Court:
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> > Tying arrangements are abhorred by the Courts primarily because they foreclose a substantial quantity of business to competitors and extend preexisting economic powers to new markets for no good justification . . . . *Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie.*
>
> *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971) (citation omitted), *cert. denied*, 404 U.S. 1963 (1972).

Despite Petitioner's lengthy discussion of a wide-ranging array of cases, it has failed to show why the courts

below erred in refusing to find a *per se* violation of the antitrust laws. The only consequence of Respondents' conduct alleged by Petitioner was the exaction of the so-called "penalty rent." We have demonstrated that this concept is an economic impossibility. No other anticompetitive effects were alleged or can be conceived. Therefore, there is no basis whatsoever for applying the *per se* rule to (or, indeed, finding any basis for a violation with respect to) the conduct in question.

Petitioner's reliance on *United States v. Loew's Inc.*, 189 F. Supp. 373 (S.D.N.Y. 1960), *vacated and remanded*, 371 U.S. 38 (1962), to support the proposition that price differentials alone can be the equivalent of tying agreements, and subject to adjudication under the *per se* standard, is mistaken. Petitioner relies on the language of a remedial decree which was entered *after* the court had found an *actual tying agreement* with all of the attendant anticompetitive effects. The terms of the decree fashioned by the district court and this Court cannot, therefore, be interpreted as the standard for identifying unlawful behavior, much less the basis for designation of antitrust conduct subject to a *per se* analysis. Indeed, the court of appeals has explicitly warned against relying on the remedy decreed in *Loew's* as a basis for determining what constitutes an unlawful tie. *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1136-37 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

Equally inappropriate is Petitioner's reliance on this Court's opinion in *Associated Press v. United States*, 326 U.S. 1 (1945) to support its contention that when a party receives some form of payment to compensate it for the loss of an anticompetitive benefit, a violation of Section 1 of the Sherman Act is stated (Petition at 32-35). In *Associated Press*, this Court found a myriad of elements

in the by-laws of Associated Press that did, in fact, restrain trade or inevitably would have done so (326 U.S. at 12).[4] Thus, contrary to Petitioner's misreading of the case, the Court did *not* find that Associated Press violated Section 1 of the Sherman Act because certain of its members received compensation *in lieu* of the benefits of a restraint of trade.

Similarly, the boycott cases cited by Petitioner do not advance its dubious legal theory that *conduct alone* can violate Section 1 of the Sherman Act without a showing that the conduct restrained trade. In each of these cases, coercive conduct was significant because it was the means used to effectuate an actual restraint. In *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the plaintiff could not, in fact, purchase products because it was being boycotted. In *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), an injunction action, this Court found that the defendant's publication of a list of wholesalers who conducted retail business was designed to cause retailers to stop dealing with such wholesalers—a clear restraint of trade. Neither of these situations is analogous to the instant facts.

In a last gasp attempt to save its Petition, Petitioner urges remand of this action at least to evaluate Respondents' conduct under the "rule of reason" standard. Petition at 46. But liability under the rule of reason also requires proof of a restraint of trade, and a private cause of action requires injury. As Respondents have already

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4. In *Associated Press, supra*, the United States sought injunctive relief against Associated Press and its members. The Court concluded that the government could obtain injunctive relief, even if the conspiracy to restrain trade had not yet resulted in an actual restraint, so long as the inevitable result of the conspiracy would be to restrain competition. In light of the Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, it is unlikely that a private plaintiff seeking damages under Section 4 of the Clayton Act would have standing to assert such a claim.

demonstrated, Petitioner has pointed to no set of facts that amounts to either any restraint of trade or injury to Petitioner. Accordingly, there is simply no basis for remand of this case for a rule of reason analysis, and the court of appeals was correct in dispensing with a discussion of it.

CONCLUSION

Having failed to demonstrate any basis for its allegation of a restraint of trade, Petitioner's attempt to establish liability under the Sherman Act was properly rejected. The allegation of injury from submission to a penalty rent is spurious on its face. Petitioner has stated no set of facts that supports the designation of an attempted tie-in or boycott as a *per se* violation of the Sherman Act. This Court should deny the Petition for Certiorari.

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